No. 89-475

(2)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

PEAT MARWICK MAIN & CO.,
Petitioner,

VS.

PHILIP D. ROBERTS, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did respondents state a cause of action for aiding and abetting a violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), against Peat Marwick Main & Co. ("Peat Marwick"), a nationally recognized public accounting firm, sufficient to withstand a motion to dismiss under Rule 12(b)(6), Fed.R.Civ.P., where they alleged that Peat Marwick: (i) participated in the preparation of allegedly false and misleading offering documents on which respondents relied in investing approximately forty-five million dollars ($45,000,000) in cash in unregistered limited partnership interests; (ii) consented to the use of its name in such offering documents after having learned of their falsity by virtue of an investigation it conducted, thereby inviting the investing public to rely on the firm's reputation as a selling tool and as evidence of the genuiness of the offerings; (iii) had effective control over the occurrence of the offerings; and (iv) subsequent to dissemination of the allegedly false and misleading offering documents, rendered allegedly false and misleading audit reports on partnership financial statements and disseminated allegedly false and misleading tax forms on which respondents relied in making additional capital contributions to the partnerships.

PARTIES BELOW

Respondents Philip D. and Lynn Roberts, Denny and Karen Delk, Jack T. Bell, and Arthur B. Gauss are representatives of a class, certified pursuant to Rule 23(b)(3), Fed.R.Civ.P., defined to include all persons and entities, excluding any defendants, who purchased or otherwise acquired an interest in any of thirty-eight limited partnerships named as defendants below. Complaint ¶ 12.

Petitioner Peat Marwick Main & Co. is a partnership of certified public accountants and is the successor-in-interest to Peat, Marwick, Mitchell & Co., which was named as a defendant below.

Houston Harbaugh, P.C. was a defendant/appellee below but is not a party to this proceeding.

The American Institute of Certified Public Accountants and Lomas Mortgage U.S.A., Inc. participated as *amicus curiae* on behalf of petitioner in the United States Court of Appeals for the Ninth Circuit.

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STATEMENT OF THE CASE

A. The Underlying Litigation

The underlying litigation was initiated on December 31, 1984 when certain of the respondents, together with other individuals not parties hereto, filed a class action complaint in the United States District Court for the Northern District of California against various defendants, including Peat Marwick. In essence, respondents alleged that they sustained damages as a result of their purchase of limited partnership interests in reliance on offering memoranda which omitted and misrepresentated material facts in violation of the antifraud provisions of the federal securities laws and state law.

Respondents claim that the offering memoranda omitted to state that their partnership investments were part of a single, interrelated and integrated fraud scheme by which thirty-eight (38) limited partnerships were formed and sold purportedly to engage in the application of certain enhanced oil recovery

("EOR") technologies to oil-bearing properties. Pursuant to the offerings, the partnerships' promoters collected two hundred million dollars ($200,000,000) in cash from the members of the class.[1] In addition, it was represented in the offering memoranda that investors would be able to claim certain tax deductions as a result of their investments. However, the Internal Revenue Service ("IRS") disallowed these tax deductions in their entirety, and has claimed that the United States has been wrongfully deprived of one billion two hundred million dollars ($1,200,000,000) in tax revenues as a result of the alleged fraudulent scheme. *See generally Krause v. Commissioner,* 92 T.C. 11 (1989) (discussing the contention that certain of the partnerships at issue are abusive tax shelters).

In claiming that their partnership investments were part of an integrated fraud scheme, respondents also allege that: (i) the represented tax benefits were not available from the inception of the offerings; (ii) that the EOR technologies purportedly licensed by the partnerships were either known to be ineffectual or were licensed by the partnerships from related parties at grossly inflated prices; (iii) that the partnerships acquired interests in properties from undisclosed partnership promoters at inflated prices; and (iv) that the partnership interests were offered and sold in violation of the registration requirements of the Securities Act of 1933.[2]

B. The Role Of Peat Marwick In The Alleged Fraud

Peat Marwick's request to invoke this Court's jurisdiction is based on an erroneous premise. Thus, it is argued that the United States Court of Appeals for the Ninth Circuit erred in reversing the district court's dismissal with prejudice, pursuant to Rule

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[1] The offerings in which Peat Marwick was directly involved resulted in cash investments of approximately forty-five million dollars ($45,000,000).

[2] Peat Marwick incorrectly states that the sole basis for respondents' claims is the failure of the EOR technologies. Petition for Certiorari at 4. As noted, respondents' allegations focus on several aspects of the partnership offerings, only one of which concerns the technologies.

12(b)(6), Fed.R.Civ.P., of respondents' claim against Peat Marwick for aiding and abetting a violation of Section 10(b) of the Exchange Act, because the only allegation as to Peat Marwick was the truthful statement that the firm agreed to perform accounting services for the partnerships in the future. Petition for Certiorari at 3.

However, as the Ninth Circuit correctly observed in reversing the district court's improvident dismissal of respondents' claim, the facts which give rise to the claim for relief against Peat Marwick go well beyond mere "agreement to provide future services." As the Ninth Circuit noted,

> In substance, the investors' fourth amended complaint recited the following facts, the truth of which is presently assumed: (1) the offering documents indicated that Peat, Marwick agreed to perform accounting services for the partnerships; (2) before Peat, Marwick agreed to perform future services, it reviewed the offering memoranda and investigated partnership management, learning of fraudulent material; (3) through this process, Peat, Marwick participated in drafting the memoranda or had effective control over the contents by consenting to the use of its name; (4) Peat, Marwick audited and opined on the financial statements of, and prepared the tax returns for the partnerships for the years ending December 31, 1981, December 31, 1982, December 31, 1983, and December 31, 1984; (5) these opinions were disseminated to the investors; (6) by assisting in the preparation of the memoranda and its investigation of the management of the partnerships, Peat, Marwick knew in what respects the memoranda were false and misleading, and furthered the fraud by consenting to inclusion of its name.

Roberts v. Peat, Marwick, Mitchell & Co., 857 F.2d 646, 652 (9th Cir. 1988).

The Ninth Circuit's accurate statement of respondents' allegation highlights the fatal error of Peat Marwick's petition. In its zeal to capture this Court's attention, Peat Marwick misstates respondents' allegation in a futile attempt to show that the Ninth

Circuit's decision constitutes an extension of existing law and conflicts with authority from other circuits.

Contrary to Peat Marwick's contention, however, respondents' aiding and abetting allegation is not based *solely* on what Peat Marwick self-servingly characterizes as its "silence or inaction" in the face of its alleged knowledge that a fraud was afoot. Instead, Peat Marwick is alleged to have engaged in manipulative and deceptive conduct by participating in the preparation of false and misleading offering documents, agreeing to lend its name and credibility to such materials while knowing they were infected with fraud, and by continuing to participate in a fraudulent scheme through dissemination of allegedly false and misleading audit reports and tax forms which respondents relied on in making additional cash contributions over a period of several years. This demonstrates the folly of Peat Marwick's assertion that respondents' claim is merely that Peat Marwick remained silent about the alleged fraud when it had no independent duty to disclose and, therefore, no aiding and abetting claim will lie.

Peat Marwick audited and opined on the financial statements for at least five (5) of the partnerships syndicated in 1981. Complaint ¶ 17(a). The offering memoranda for those partnerships represented that Peat Marwick would perform accounting services therefore, including preparing reports on audited partnership financial statements. *Id.* Subsequent to dissemination of Peat Marwick's report on the financial statements for the 1981 partnerships, it continued to permit its name to be used in offering memoranda for two (2) partnerships syndicated in 1982. *Id.* Obviously, then, this case involves far more than Peat Marwick's silence or inaction. It involves Peat Marwick's participation in preparation of allegedly false and misleading 1981 offering memoranda, rendition of audit services to those partnerships, including issuance of unqualified opinions on their financial statements, followed by dissemination of new partnership offering memoranda which continued to reflect Peat Marwick's participation.[3] Indeed,

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[3] One of the partnership offering memoranda actually contained a report on the financial statement of one of the issuing entities. Complaint ¶ 17(a).

Peat Marwick continued to render reports on partnership financial statements and tax forms into 1984. This hardly bespeaks "silence or inaction" on the part of Peat Marwick.[4]

The Ninth Circuit reversed the district court precisely because the lower court misconstrued respondents' allegation in the same manner in which it is erroneously presented by Peat Marwick in its petition. *Roberts v. Heim*, 670 F. Supp. 1466, 1482 (N.D. Cal. 1987), *aff'd in part and rev'd in part sub nom. Roberts v. Peat, Marwick, Mitchell & Co.*, 857 F.2d 646, 652-653 (9th Cir. 1988).[5] As discussed below, there cannot be any serious question that under the applicable pleading standards which must be applied,

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[4] The significance of these facts cannot be understated. By way of example, respondent Arthur B. Gauss purchased an interest in a 1982 partnership pursuant to an offering memorandum which represented that Peat Marwick would provide future accounting services, including preparation of reports on audited partnership financial statements. By the time Dr. Gauss invested, Peat Marwick had completed its audit of the 1981 partnerships and had rendered unqualified opinions on those partnerships' financial statements. These 1981 partnerships were identified in the offering memorandum relied on by Dr. Gauss in purchasing his interest in a virtually identical 1982 partnership. Obviously, had Peat Marwick declined to render an unqualified report on the 1981 partnership financial statements, or at least qualified its report thereon, Dr. Gauss would likely never have been offered the opportunity to invest in a 1982 partnership or, if he had, would have been alerted to the possibility of a fraud. As a result, it cannot seriously be questioned that Peat Marwick engaged in a manipulative and deceptive act in agreeing to be identified in the 1982 partnership offering memoranda after completing its audit of the 1981 partnerships' financial statements.

[5] The district court's analysis of Peat Marwick's motion to dismiss consisted of one paragraph in a twenty-five (25) page opinion which addressed complex issues concerning class certification, motions to dismiss, and motions for summary judgment brought by virtually all of the one hundred three (103) defendants named below. *Roberts v. Heim, supra*, 670 F.Supp. 1466. Perhaps this explains the district court's failure to address the totality of the factual allegations made against Peat Marwick.

respondents alleged a cognizable claim for relief against Peat Marwick as an aider and abettor of a securities fraud.[6]

C. Procedural Background Giving Rise To The Petition For A Writ of Certiorari

The relevant complaint for purposes of this proceeding is respondents' one hundred fifty-three (153) page Fourth Amended Complaint, filed June 16, 1986. Respondents alleged therein claims against Peat Marwick for, *inter alia,* primary and secondary violations of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, 17 C.F.R. ¶ 240.10b-5. The district court entered summary judgment in favor of Peat Marwick on the primary violation claim and dismissed the aiding and abetting claim with prejudice. 670 F.Supp. 1466, 1474, 1482. Following entry of judgment pursuant to Rule 54(b), Fed.R.Civ.P., respondents appealed. In a *per curiam* opinion the Ninth Circuit affirmed the summary judgment but reversed the dismissal of the aiding and abetting claim. 857 F.2d at 648, 652.

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[6] Respondents alleged that the reports on financial statements and Form K-1 tax forms prepared by Peat Marwick gave rise to a claim for primary liability under Section 10(b) of the Exchange Act. Summary judgment on this claim in favor of Peat Marwick was affirmed by the Ninth Circuit on the ground that payments on promissory notes made after initial cash contributions were not separate purchases of securities. 875 F.2d at 649-652. Nonetheless, as the Ninth Circuit noted, Peat Marwick's continuing involvement in the offerings by virtue of its preparation of these documents, which were disseminated to and relied on by limited partners prior to making additional cash contributions, supports the allegation that Peat Marwick knowingly rendered substantial assistance to a fraudulent scheme. The fact that the allegations respecting Peat's audit reports and tax returns were set forth within respondents' primary violation claim is irrelevant. Complaint ¶¶ 43(a), 60(a). It is well settled that, "[t]he entire pleading will be scrutinized to determine if any legally cognizable claim can be found within it . . . A pleading will be judged by its substance rather than according to its form or label and, if possible, will be construed to give effect to all its avertments." 5 Wright & Miller, *Federal Practice and Procedure,* ¶ 1286 at 383 (2d Ed. 1969) (footnotes omitted); see also *Walker v. KFC Corp.,* 515 F.Supp. 612, 619 (S.D. Cal. 1981), *modified on other grounds,* 728 F.2d 1215 (9th Cir. 1984).

Peat Marwick's Petition for Rehearing with Suggestion for Rehearing *En Banc* in the Ninth Circuit failed to draw a single supporting vote. The instant petition for a writ of certiorari followed.

D. The Legal Issues Raised By The Petition For A Writ of Certiorari

The petition for a writ of certiorari seeks this Court's review of a legal issue which has been resolved in a uniform manner by the courts of appeals on numerous occasions. Thus, there can be no dispute that all of the circuit courts have held that a private cause of action exists for aiding and abetting a violation of Section 10(b) of the Exchange Act and that three elements must be established in order for liability to attach: (1) the existence of a primary wrong; (2) knowledge on the part of the aider and abettor of the wrong; and (3) the aider and abettor's substantial assistance in the wrong. *E.g., Rochez Brothers, Inc. v. Rhoades*, 527 F.2d 880, 886 (3d Cir. 1975); *SEC v. Rogers*, 790 F.2d 1450, 1460 (9th Cir. 1986); Comment, *Aiding And Abetting Liability Under Securities Exchange Act Section 10(b) and SEC Rule 10b-5: The Infusion of A Sliding-Scale, Flexible-Factor Analysis*, 22 Loy.L.A.Rev. 1189, 1192-93 (June 1989).

Peat Marwick contends, however, that a "conflict" exists among certain of the circuit courts because, it is claimed, the Seventh and Second Circuits have held that an "independent" duty to disclose must exist before silence can give rise to liability, whereas the Ninth and Eleventh Circuits have held that participation in a fraudulent scheme may give rise to liability on the part of an alleged aider and abettor, even in the absence of an "independent" duty to disclose. Petition for Certiorari at 9.

There are three fundamental problems with these contentions. First, there are no conflicts among the circuit courts as to the existence of a private cause of action for aiding and abetting a violation of Section 10(b) or the elements of such a claim. Merely because some courts have applied the elements of the aiding and abetting claim to different factual scenarios in different ways does not constitute a "conflict" sufficient to invoke this Court's jurisdiction. Secondly, contrary to Peat Marwick's asser-

tion, this is *not* a case about silence or inaction. As a result, even if there were a conflict among the circuits respecting whether or not silence is actionable as aiding and abetting absent an "independent" duty to disclose, that issue simply is not raised by this case. In any event, the cases are consistent in holding that the existence or non-existence of a duty to disclose relates only to the degree of *scienter* required in order to find an aider and abettor liable, not whether the claim is valid in the first instance. *E.g., Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 575 (2d Cir.), *cert. denied*, 459 U.S. 838 (1982); *IIT, An International Investment Trust v. Cornfeld*, 619 F.2d 909, 927 (2d Cir. 1980); *Monsen v. Consolidated Dressed Beef Co.*, 579 F.2d 793, 800 (3d Cir.), *cert. denied*, 439 U .S. 930 (1978). Finally, the *in terrorem* effects Peat Marwick claims will arise if the Ninth Circuit's decision is allowed to stand are illusory. Contrary to such hyperbole, the decision in *Roberts* will not permit a securities plaintiff to allege aiding and abetting liability against professionals whose *only* involvement is lending their names to an offering. As noted, the Ninth Circuit upheld the sufficiency of respondents' allegation because Peat Marwick is alleged to have been deeply embroiled in a fraudulent scheme over a number of years, starting with its participation in the preparation of false and misleading offering materials and continuing through issuance of unqualified reports on partnership financial statements and tax forms. As such, this case is not the appropriate vehicle to review the issues raised by Peat Marwick which were neither briefed or decided below and have little, if any, relevance to the allegation made by respondents.

REASONS FOR DENYING THE WRIT

I

THE WRIT SHOULD BE DENIED BECAUSE IT SEEKS REVIEW OF AN ISSUE WHICH WAS NOT BRIEFED OR DECIDED BELOW AND AS TO WHICH THERE IS UNANIMITY OF OPINION AMONG THE COURTS OF APPEALS

Peat Marwick seeks review of the Ninth Circuit's decision in *Roberts* in order to give this Court the opportunity to resolve the previously reserved question of whether or not a private cause of action exists for aiding and abetting a violation of Section 10(b) of the Exchange Act.[7] For several reasons, this issue should not be resolved by this Court in the context of this case.

First, the issue of the existence of a private cause of action for aiding and abetting a violation of Section 10(b) of the Exchange Act was not briefed, argued, or addressed in either the district court or the Ninth Circuit and thus should not be considered by this Court in the context of this case. Secondly, for sound legal and policy reasons, the courts of appeals unanimously hold that a private cause of action for aiding and abetting a violation of Section 10(b) of the Exchange Act exists. Finally, Peat Marwick has failed to articulate any compelling reason why the Court should take this opportunity to do away with aiding and abetting liability, which is an important tool in the private enforcement of the nation's securities laws.

As a general rule, this Court will not review issues not considered by the district court or the court of appeals. *E.g., Miree v. DeKalb County, GA.*, 433 U.S. 25, 33-34 (1977) ("the fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed in the District Court or the Court of Appeals, we will not consider it"); *Adickes v. S.H. Kress and Co.*, 398 U.S.

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[7] In *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 192 n.2 (1976), this Court reserved decision on the question of whether civil liability for aiding and abetting a violation of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder is appropriate.

144, 147 n.2 (1970) (where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them). In this case, the issue of the existence *vel non* of a private cause of action for aiding and abetting a violation of Section 10(b) of the Exchange Act has simply never previously been raised or decided. For this reason alone, the petition for a writ of certiorari should be denied.

In addition to the fact that the issue sought to be reviewed was neither raised or decided below, the circuit courts unanimously hold that there exists a private cause of action for aiding and abetting a violation of Section 10(b) of the Exchange Act.[8] Accordingly, there is no conflict among the courts of appeals as to this issue, within the meaning of Supreme Court Rule 17.1(a). Moreover, given the uniformity of opinion among the circuit courts on this issue, it appears that it is not the type of important question of federal law which compels resolution by this Court at this time. Supreme Court Rule 17.1(c).

Merely because this Court has previously reserved decision on an issue does not mean that review thereof is necessary. For example, this Court has never directly faced the issue of whether there exists an implied private right of action for violations of Section 10(b) of the Exchange Act but, rather, has repeatedly accepted the existence of such a cause of action. *E.g., Herman &*

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[8]*See, e,g., Cleary v. Perfectune, Inc.*, 700 F.2d 774, 777 (1st Cir. 1983); *Edwards & Hanly v. Wells Fargo Securities Clearance Corp.*, 602 F.2d 478, 484 (2d Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980); *Monsen v. Consolidated Dressed Beef Co., Inc., supra*, 579 F.2d at 799; *Pargas, Inc. v. Empire Gas Corp.*, 423 F.Supp. 199, 240-41 (D. Md.), *aff'd*, 546 F.2d 25 (4th Cir. 1976); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975); *SEC v. Coffey*, 493 F.2d 1304, 1315 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975); *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1043 (7th Cir.) *cert. denied*, 434 U.S. 875 (1977); *Metge v. Baehler*, 762 F.2d 621 (8th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *Jett v. Sunderman*, 840 F.2d 1487, 1491 (9th Cir. 1988); *Zabriskie v. Lewis*, 507 F.2d 546, 553 (10th Cir. 1974); *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1009-10 (11th Cir. 1985); *Investors Research Corp. v. SEC*, 628 F.2d 168, 177 (D.C. Cir.), *cert. denied*, 449 U.S. 919 (1980).

MacLean v. Huddleston, 459 U.S. 375, 380 n. 10 (1983) (because the courts had "consistently recognized for more than 35 years" an implied private right of action under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, the issue was "simply beyond peradventure"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (twenty five years after the first district court held that there was an implied right of action under Rule 10b-5 of the Securities Exchange Act of 1934, the Court "confirmed with virtually no discussion the overwhelming consensus of the District Courts and Courts of Appeals that such a cause of action did exist.") (quoted with approval in *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 380 (1982)).

A similar circumstance applies to the private cause of action for aiding and abetting a violation of Section 10(b) of the Exchange Act. Recognition of the existence of such a private cause of action appears to stem from the seminal decision in *Brennan v. Midwestern United Life Ins. Co.*, 259 F.Supp. 673, 680-681 (N.D. Ind. 1966) (motion to dismiss denied), 286 F.Supp. 702 (N.D. Ind. 1968) (on merits after trial), *aff'd.* 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970). Inasmuch as the existence of a private cause of action for aiding and abetting a violation of Section 10(b) of the Exchange Act has, since *Brennan*, been repeatedly recognized in the federal courts for more than twenty-three (23) years, there can be no serious question that such a cause of action is properly ensconced within Exchange Act jurisprudence.

In the face of this compelling history, the attempt to show that the well-established private cause of action for aiding and abetting a violation of Section 10(b) of the Exchange Act somehow contravenes the intent of Congress or is inconsistent with the statute itself should be rejected. In *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), this Court reaffirmed that congressional intent and statutory consistency constitute the "essential predicate for implication of a private remedy." *Id.* at

145 *citing Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981).[9]

Significant here is the fact that congressional intent to imply a private right of action may be inferred in a situation where there has been a routine and consistent recognition by the federal courts that such a cause of action exists. *Scientex Corp. v. Kay*, 689 F.2d 879, 884 (9th Cir. 1982). Precisely that scenario exists here. The district courts and courts of appeals have "routinely and consistently" recognized the existence of a private cause of action for aiding and abetting a violation of Section 10(b) of the Exchange Act.

That Congress intended such a cause of action to remain unimpaired is confirmed by the legislative history. Congress has repeatedly rejected attempts to amend the federal securities laws to prohibit aiding and abetting as a violation of Section 10(b) of the Exchange Act. In 1975, the most comprehensive revisions of the federal securities laws that have occurred since passage of the Exchange Act were enacted, and no limitations were legislated on the private cause of action for aiding and abetting a violation of Section 10(b) of the Exchange Act, notwithstanding that such a cause of action had repeatedly been employed in federal decisional law. See *Herman & MacLean v. Huddleston, supra*, 459 U.S. at 384-385 (describing the 1975 legislation). By 1983, a congressional report had specifically endorsed, "the judicial application of aiding and abetting liability to achieve the remedial purposes of the securities laws."[10] Furthermore, Section 28(a) of

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[9] Much of Peat Marwick's argument in this connection is based on an almost decade old law review article espousing an extreme view of application of aiding and abetting principles in the context of the federal securities laws which, to our knowledge, has never been adopted. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act [sic] of 1934*, 69 Calif.L.Rev. 80 (1981).

[10] H.R. Rep. No. 355, 98th Cong., 2d Sess 10 (1983) *reprinted* in 1984 U.S. Code Cong. & Admin. News 2274, 2283. This extended a treble damages civil penalty in SEC enforcement actions to persons who aided or abetted insider trading violations by tipping. This authority was removed by the Insider Trading and Securities Fraud Enforcement Act

the Exchange Act contains an explicit saving clause which provides that, "[t]he rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity." 15 U.S.C. § 78bb(a). Finally, courts have recognized that, in the absence of aiding and abetting liability under Section 10(b), the basic remedial purposes of the Exchange Act could be circumvented with impunity. *E.g., Aldrich v. New York Stock Exchange*, 446 F.Supp. 348, 355 n.5 (S.D.N.Y. 1977). This undesirable result would leave defrauded investors with no federal remedy against key participants in securities violations.

Simply put, Peat Marwick's request that this Court use this case to unravel decades of sound law should be denied. As Congress has recognized, the existence of a private cause of action for aiding and abetting a violation of Section 10(b) of the Exchange Act comports with congressional intent as well as the letter and spirit of the statute itself.

II

THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS AS TO THE PLEADING ISSUE RAISED BY THIS APPEAL

Peat Marwick attempts to conjure an issue for this Court's review by referring to an alleged conflict among certain circuit courts regarding the pleading issue decided by the Ninth Circuit in *Roberts*. As demonstrated below, there is no true conflict among the circuit courts. Accordingly, the petition for a writ of certiorari should be denied.

Initially, we note that the entire premise of Peat Marwick's argument respecting a circuit court "conflict" is dependent on the conclusion that this appeal involves an aiding and abetting claim against a participant in a securities transaction who is alleged to have done nothing more than remain silent in the face of its

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of 1988, wherein tippers were declared to be primary violators of Section 10(b), rather than aiders and abettors.

alleged knowledge of a fraud.[11] This contention is, of course, wrong. This case is not about silence or inaction or, stated another way, "whistleblower" liability. Peat Marwick is alleged to have rendered substantial assistance to a fraud by engaging in affirmative manipulative and deceptive conduct. Specifically, Peat Marwick is alleged to have participated in the preparation of false and misleading offering memoranda, to have agreed to be identified therein, and to have prepared false and misleading audit reports and tax forms relied on by limited partners in making cash contributions to the partnerships. Obviously, such conduct does not amount to "silence or inaction."

Numerous cases have held that assistance to a fraud involving a significantly lesser degree of involvement than that at issue here can give rise to aider and abettor liability. For example, in *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978), the Second Circuit found that a broker rendered substantial assistance to a fraud by the ministerial acts of processing securities transactions directed by an investment advisor, reassuring the defrauded investor of the investment advisor's competence, and recklessly failing to learn of or disclose the fraud. *Id.* at 48.

In *Monsen v. Consolidated Dressed Beef Co., supra*, 579 F.2d 793, a bank was found to have aided and abetted a borrower's continuation of a promissory note sale program violating the registration and antifraud provisions of the federal securities laws, based solely on the bank's knowledge that the notes were unregistered, that the note buyers were receiving no financial information about the borrower, and that the borrower would not reveal to the note buyers its financial difficulties or the subordinated nature of the notes. *Id.* at 801-02. The Seventh Circuit in *SEC v. First Securities Co.*, 463 F.2d 981 (7th Cir.), *cert. denied*, 409 U.S. 880 (1972) held that a broker-dealer firm aided and abetted the creation and maintenance of a fraudulent escrow by its president,

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[11] The reason for this characterization is that it is only in cases where liability is based on "silence or inaction" that there is any discernible distinction among the circuit courts insofar as application of aiding and abetting principles are concerned.

because it provided him "with the trappings of a successful investment counsellor, held him out as providing such counsel, and then wilfully allowed the enforcement of a rule regarding the opening of mail which was antithetical to the prevention of frauds of the type which occurred." *Id.* at 988.

Aiding and abetting liability has also been imposed on a lawyer where he was present at the closing of a merger which he knew had been approved on the basis of misleading proxy materials. *SEC v. National Student Marketing Corp.*, 457 F.Supp. 682, 712-13 (D.D.C. 1978). *See also Anderson v. Francis I. DuPont & Co.*, 291 F.Supp. 705, 709 (D.Minn. 1968) (sufficiency of aiding and abetting allegation against broker dealers sustained based on their giving office space to an alleged primary violator, endorsing his skill, and holding him out as an important customer); *In re Gas Reclamation, Inc. Securities Litigation*, 659 F.Supp. 493, 504 (S.D.N.Y. 1987) (motion to dismiss denied where banks and insurance companies reviewed and approved private placement memorandum, devised marketing and financing scheme and engaged in atypical financing); *Index Fund, Inc. v. Hagopian*, 609 F.Supp. 499, 509 (S.D.N.Y. 1985) (summary judgment to defendant banks denied where banks allegedly failed to supervise primary violators and provided funds used by them); *Harmsen v. Smith*, 693 F.2d 932, 944-45 (9th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983) (affirming jury verdict of aiding and abetting liability against the daughter of the principal architect of a fraudulent scheme and an officer and director of a conglomerate involved in the scheme); *Jett v. Sunderman*, 840 F.2d 1487, 1494 (9th Cir. 1988) (summary judgment in favor of an insurer reversed even in light of uncontroverted declaration that it was not involved in preparation of offering materials where evidence suggested it had knowledge of existence of a waiver in a bond which may have been material to decision to invest); *Renovitch v. Stewardship Concepts, Inc.*, 654 F.Supp. 353, 359 (N.D. Ill. 1987) (aiding and abetting claim upheld against attorneys where they either assisted in the preparation of and/or approved the statements made in allegedly false and misleading brochures used to sell securities); *Metge v. Baehler, supra*, 762 F.2d at 625-30 (bank's summary judgment motion denied where plaintiffs

claimed that bank knew issuer was selling worthless thrift certificates yet prolonged business of issuer by making atypical loans).

Clearly, numerous cases hold that conduct which does not even approach the level of Peat Marwick's participation as alleged in *Roberts* can give rise to aiding and abetting liability. Moreover, even accepting as true Peat Marwick's incorrect position that this case is about an alleged aider and abettor's silence or inaction, it is nonetheless clear that respondents' allegation against Peat Marwick states a claim for relief sufficient to withstand a motion to dismiss under Rule 12(b)(6), Fed.R.Civ.P.

The crux of Peat Marwick's argument is that a conflict exists among certain of the circuit courts regarding whether or not, in the context of a case involving silence or inaction on the part of the alleged aider and abettor, there must exist an *independent* duty to disclose—outside of the securities laws—before silence can give rise to liability. Petition for Certiorari at 9. Thus, it is contended that the decisions of the Seventh and Second Circuits in *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490 (7th Cir. 1986) and *IIT, An International Investment Trust v. Cornfeld, supra*, 619 F.2d 909, respectively, require that an "independent" pre-existing duty to act or disclose exist in order for aiding and abetting liability to be imposed, while the instant case and *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040 (11th Cir. 1986, *rehearing en banc denied*, 806 F.2d 1070 (11th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987), do not impose such a requirement.

To begin with, neither this case, nor the decision in *Rudolph*, involve silence or inaction. In both cases, accountants are either alleged to have participated in the preparation of false and misleading offering documents, or rendered audit reports on financial statements which were false when rendered, or which became false as a result of subsequent events. This contrasts sharply with the decision in *Barker*, where, as the Ninth Circuit noted, there was no evidence of any intent to deceive, that the defendants had even seen the selling documents, or that their

names were used therein. 857 F.2d at 653.[12] Likewise, in *IIT*, the Second Circuit recognized that liability may attach to an aider and abettor even in the absence of an independent duty to disclose if there is "clear evidence of the required degree of scienter . . . and a concious and specific motivation for not acting on the part of an entity with a direct involvement in the transaction." 619 F.2d at 927.

Thus, the Ninth Circuit's decision in *Roberts*, as well as *Rudolph*, fall within a well settled line of decisional authority which provides that aider and abettor liability may attach even where there may be no "independent" duty to disclose, if the evidence shows the requisite *scienter*. In these cases, the existence or non-existence of a duty relates solely to the degree of *scienter* required to find liability. This formulation provides ample protection to alleged aiders and abettors who may not have an "independent" duty to disclose, because they can only be found liable if they acted with the requisite *scienter*.[13] *See, e.g., Rudolph*, 800

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[12] *Barker* was decided on a motion for summary judgment, after a full evidentiary record was assembled. Thus, apparently even the aiding and abetting allegation in *Barker* survived the pleading stage. This same problem arises with many of the decisions relied on by Peat Marwick, where allegations apparently survived the pleading stage, as the Ninth Circuit held should be the case here, but summary judgment was ultimately entered in favor of the defendant. *E.g., Bane v. Sigmundr Exploration Corp.*, 848 F.2d 579 (5th Cir. 1988) (summary judgment evidence did not support inference that bank sought to cloak principal defendants in aura of respectability or reliability); *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 948 (7th Cir. 1989) (on summary judgment motion, plaintiffs failed to show that banks had any knowledge of, or acted recklessly, in failing to disclose fraudulent representations and omissions).

[13] All of this, of course, undermines Peat Marwick's argument that differing standards among the circuit courts insofar as aiding and abetting liability are concerned will give rise to forum shopping. To begin with, Peat Marwick is wrong in contending that, for example, the plaintiffs in *Latigo Ventures v. Laventhol & Horwath*, 876 F.2d 1322 (7th Cir. 1989) would have obtained a different result if their case was heard within the Ninth or Eleventh Circuits. Even the *Latigo Ventures* court recognized that the case before it was distinguisable from *Roberts*

F.2d at 1045; *Metge v. Baehler, supra*, 762 F.2d at 625; *SEC v. Washington County Util Dist.*, 676 F.2d 218, 226 (6th Cir. 1982); *Edwards & Hanly v. Wells Fargo Secs. Clearance Corp., supra*, 602 F.2d 478, 484-85 (2d Cir. 1979); *Gould v. American-Hawaiian S.S. Co.*, ~~535 F.2d~~ 761, 780 (3d Cir. 1976); *Woodward v. Metro Bank*, 522 F.2d 84, 97 (5th Cir. 1975); *Herm v. Stafford*, 663 F.2d 669, 684 (6th Cir. 1981); *Tucker v. Janota*, [1979 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 96,701 (N.D. Ill. Nov. 1, 1978).[14]

Where the requisite degree of *scienter* exists, coupled with substantial assistance, aider and abettor liability can properly be imposed. In such circumstances, participants who are aiders and abettors are not "insurers" of the primary violators' wrongdoing.[15]

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and *Rudolph* because there was no allegation of reliance on the auditors in making an investment decision. 876 F.2d at 1327. Moreover, the concerns respecting forum shopping ignore the venue provisions of the Exchange Act, 15 U.S.C. § 78aa, and the opportunity to move to change venue pursuant to 28 U.S.C. § 1404(a).

[14] The Ninth Circuit in *Roberts* recognized that a duty to disclose must exist. 857 F.2d at 653. Such a duty may arise based on the facts of the case. *Id.* This is in keeping with the established principle that whether or not a duty to disclose exists is a question of fact, dependent on the particular facts and circumstances of the case. *E.g., Spectrum Financial Companies v. Marconsult, Inc.*, 608 F.2d 377, 381 (9th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980); *White v. Abrams*, 495 F.2d 724, 735-36 (9th Cir. 1974).

[15] Peat Marwick argues that several cases directly conflict with the Ninth Circuit's holding in *Roberts*. This is wrong. For example, as noted, the Seventh Circuit in *Latigo Ventures v. Laventhol & Horwath, supra*, 876 F.2d at 1327 specifically found that the case was distinguishable from *Roberts*. Similarly, in *LHLC v. Cluett, Peabody & Co.*, 842 F.2d 928 (7th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 311 (1988), the Seventh Circuit found that no claim was stated against an accounting firm because the document allegedly relied on by the defrauded investor was not seen until *after* the investment decision had been made and the transaction closed. *Id.* at 932. No such circumstance is presented here. Finally, in *Schneberger v. Wheeler*, 859 F.2d 1477 (11th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 2433 (1989), the court of appeals affirmed entry of summary judgment for a defendant

III

THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT

In support of its petition for a writ of certiorari, Peat Marwick contends that the Ninth Circuit's decision conflicts with the rationales of prior decisions of this Court. As we show, the cases relied on by Peat Marwick are inapposite.

The decision principally relied upon to support this argument is *United States v. Chiarella*, 445 U.S. 222 (1980). There, an employee of a financial printer was convicted of securities fraud based on his having used material non-public information purloined from documents given his employer to purchase stock in a target company, without disclosing his knowledge to the seller. This Court reversed the conviction, finding that Chiarella had no duty to disclose the information to the seller. Obviously, there are numerous material distinctions between *Chiarella* and the facts of this case.

Initially, it should be noted that in *Chiarella* the Supreme Court required that an independent duty to disclose must exist before nondisclosure becomes *a primary violation*. This does not address the situation of whether or not an independent duty to disclose must be found before aiding and abetting liability can be imposed. In any event, the *Chiarella* decision does not conflict with the case law which holds that, absent a duty to disclose, an aider and abettor can be liable if the requisite degree of *scienter* and substantial assistance is shown. Furthermore, the decision in *Chiarella* involved a *purchaser's* nondisclosure rather than, as here, nondisclosures by one of the world's largest accounting firms which was involved in the preparation of documents which it knew would be relied on by investors in making investment decisions. As stated in *Andreo v. Friedlander, Gaines, Cohen, Etc.*, 660 F.Supp. 1362 (D.Conn. 1987):

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bank because no evidence had been adduced that the bank had knowledge of a fraud. *Id.* at 1480-81. Significantly, the decision in *Schneberger* suggests that even if the bank had no independent duty to disclose, if there had been the requisite showing of *scienter*, aiding and abetting liability could properly be imposed. *Id.*

> While it is not reasonably foreseeable that a seller would rely on the disclosures of a purchaser (absent some special relationship), it is reasonably foreseeable that investors would rely on the expertise of the professionals that draft offering memoranda and tax opinions. As a result, such professionals should be under the obligation to not act in reckless disregard of the truth when they undertake the drafting of such documents.

Id. at 1368.

Numerous cases have noted the factually unique context in which *Chiarella* and a companion case, *Dirks v. SEC*, 463 U.S. 646 (1983), arose. For example, in *Deutschman v. Beneficial Corp.*, 841 F.2d 502 (3d Cir. 1988), the Third Circuit, in reversing dismissal of a class action securities fraud complaint, held that,

> The district court's reliance on *Chiarella* and *Dirks* is entirely misplaced. Those cases dealt not with injury caused by affirmative misrepresentations which affected the market price of securities, but with the analytically distinct problem of trading on undisclosed information; a theory of recovery which Deutschman does not plead. The 'disclose or abstain from trading' rule laid down in the insider trading cases imposes on insiders a duty to disclose information which need not otherwise be disclosed before they act on that information in any uninformed marketplace. Market participants who are neither insiders nor fiduciaries of another type need not disclose material facts, but can rely on the assumption that all other participants have equal access to information. *Chiarella* and *Dirks* involve only the question of when outsiders and nonfiduciaries will be treated as insiders or fiduciaries for purposes of the affirmative duty to disclose or refrain from trading. The court in those cases declined to extend the duty to disclose or abstain to mere tippees who came into possession of otherwise undislosed information. Nothing in those opinions, however, can be construed to require the existence of a fiduciary relationship between a section 10(b) defendant and the victim of that defendant's affirmative misrepresentation.

Id. at 506; *see also Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1125 n. 22 (5th Cir. 1988) (*Chiarella* and *Dirks* involved SEC charges of breach of a specialized duty); *United States v. Carpenter*, 791 F.2d 1024, 1029 (2d Cir. 1986), *aff'd*, ___ U.S. ___, 108 S.Ct. 316 (1987) ("[t]o give *Dirks* such preclusive effect would suggest that one application of a statute cannot admit of another application not raised in the first case").

There is nothing in the Ninth Circuit's decision in *Roberts* which conflicts with the holding of *Chiarella* and *Dirks*. When Peat Marwick participated in the preparation of the offering materials and agreed to allow its name to be used to sell securities, the investing public understood that Peat Marwick was vouching for the integrity of the offering, and reasonably assumed that the firm would not allow its name to be used to perpetrate a fraud. Likewise, when Peat Marwick issued audit reports on the partnerships' financial statements and prepared tax forms, the investing public could properly assume that, in the event a fraud was afoot, Peat Marwick would disclose it. As the Eleventh Circuit in *Rudolph* held, "[s]tanding idly by while knowing one's good name is being used to perpetrate a fraud is inherently misleading." 800 F.2d at 1044. For Peat Marwick to contend that its conduct in this case was not "communicative" misconstrues respondents' allegations and defies reality. Simply put, nothing in *Roberts* conflicts with this Court's prior decisions.

IV

PUBLIC POLICY CONSIDERATIONS SUPPORT DENIAL OF REVIEW

Peat Marwick advances several "public" policy considerations which it claims support review. These contentions should be viewed with a wary eye, however, since they are proffered on behalf of the accounting industry, not on behalf of the investing public, for whose benefit the federal securities laws were enacted in the first instance. Simply put, Peat Marwick's policy arguments are made in support of an unnecessarily restrictive view of the federal securities laws. Such arguments should be rejected.

Any discussion of the policy implications of a particular decision must start with consideration of the laws which were applied, their purpose, and how they have been interpreted. This Court has repeatedly recognized that the federal securities laws should be construed not technically and restrictively but flexibly to effectuate their broad remedial purposes. *E.g., Basic Inc. v. Levinson*, ___ U.S. ___, 108 S.Ct. 978, 982 (1988); *Herman & MacLean v. Huddleston, supra*, 459 U.S. at 386-87; *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972), *reh'g denied*, 407 U.S. 916.

This principle is especially important today, when severe budget constraints have diminished the capability of the SEC to police the ever growing number of public and private securities offerings. The salutary goal of permitting a private plaintiff to pursue a securities fraud should, if anything, be encouraged in this environment.

Peat Marwick contends that the decision in *Roberts* departs from established principles of accountant liability. Traditionally, argues Peat Marwick, an accountant has only been held liable for what it represented in opinions on the financial statements of business entities. Peat Marwick goes on to suggest that the courts and investors understand that accountants only act through their reports and, therefore, the Ninth Circuit decision will somehow undermine this understanding. This is an Alice in Wonderland description of the accountant's role in today's business world. Accountants routinely and increasingly offer services other than conducting audits and preparing reports on financial statements. Indeed, the accounting profession now relies on non-auditing "consulting" and related services for a substantial part of its revenues. In agreeing to involve themselves in private securities offerings of the type at issue here, accountants undertake a responsibility to refrain from rendering critical assistance to a fraud on the investing public. That is especially true where, as here, not only did the accountant embroil itself in a securities offering by participating in the preparation of offering memoranda, but thereafter prepared reports on the issuer's financial statements.

This Court has previously described the accountant's role as one of "public watchdog." In *United States v. Arthur Young & Co.*, 465 U.S. 807 (1984), this Court stated:

> By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.

Id. at 817-818 (emphasis in original).

The adverse consequences Peat Marwick alleges will arise if the Ninth Circuit's decision is allowed to stand ring hollow. Considerations such as the rising costs to accountants and their clients attributable to potential securities law liability pale in comparison to the damage—both monetary and psychological—to which the investing public is exposed in fraudulent securities schemes such as that in which Peat Marwick was involved. Moreover, the threat to creation of new business ventures which Peat Marwick claims the *Roberts* decision presents is a fiction. No empirical evidence whatsoever is offered to support the theory that increased exposure to securities law liability is harming the creation of new businesses. It is not too much to ask that professionals such as accountants, lawyers, and bankers decline to involve themselves in transactions where they know that a fraud is being committed. When they are involved in fraudulent schemes, they should not be immune to suit under the federal securities laws by investors who relied on their participation in making investments.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari filed in this case should be denied.

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Respectfully submitted,

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